NO. 47157-4

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

NGA NGOEUNG, APPELLANT

Review of Setting Minimum Term from the Superior Court of Pierce County
The Honorable Stanley Rumbaugh

No. 94-1-03719-8

SUPPLEMENTAL BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

Other Authorities

A. ISSUES PERTAINING TO COURT'S ORDER FOR SUPPLEMENTAL BRIEFING.

1. What impact should the decision in ***State v. Bassett***, which issued April 25, 2017, have on the case before the court?

B. STATEMENT OF THE CASE.

On August 24, 1994, four high school boys drove down a Tacoma street throwing eggs at houses. One or two eggs were thrown at a house which turned out to be a hangout for local gang members. As the boys drove away from the house and toward their home, they noticed that they were being followed. The car in pursuit had its high beams on and was following closely. The boys tried to evade the pursuers, but the car kept up. The boys heard gunfire and ducked down in their seats. The pursuing car pulled up beside the boys' car, matching its speed. A second shot shattered the car window. More shots were fired and the driver of the car was hit. The boys' car drifted up the embankment and came to a stop. The other three boys ran from the car to local houses, but one of them fell to ground on the way, mortally wounded. The remaining two boys reached help, but their friends were dead before an ambulance arrived.

The subsequent investigation identified the three occupants of the pursuing car: Oloth Insyxiengmay ("O.I."), Nga Ngoeung ("defendant"), and Southanom Misaengsay ("S.M.") all of whom were under 18 years of age. All three had been outside the house when it was egged. When he

saw the egging, O.I. ran into the house and returned with a rifle. O.I. said something to the effect of "let's go get 'em" or "I'm going to get them." Defendant heard him make this statement. O.I opened the car door for S.M. and told him to get in. Defendant took the driver's seat and drove off after the boys.

At defendant's trial, evidence was admitted to show that he had participated in a prior drive-by shooting as relevant to show his knowledge of the intent of O.I. to fire the shots at the boys' car. In the prior incident, defendant drove a car that was involved in a shootout with another car and defendant had pulled up beside the other car, then his passenger fired into the other car. Evidence was also introduced of defendant's and O.I.'s gang involvement as relevant to proof of motive. The State's theory was that the shooting was a response to an apparent "dissing" or disrespect of gang territory.

A jury found defendant Nga Ngoeung guilty of two counts of aggravated first degree murder, two counts of assault in the first degree, and one count of taking a motor vehicle without permission. CP 17-27. The offense occurred on August 25, 1994, 51 days before defendant's eighteenth birthday. CP 51-57. Defendant was sentenced to consecutive terms of life without the possibility of parole (LWOP) for the aggravated murders, 136 months and 123 months respectively on the two assault counts (consecutive)

to each other, and the LWOP sentences and 8 months on the motor vehicle offense. CP 17-27.

Defendant was brought back to Pierce County Superior Court for a hearing to set a minimum term on each of defendant's convictions for aggravated murder as required by RCW 10.95.035. 1RP 1-5; 2RP 10-12. This newly enacted statute, RCW 10.95.035, was in response to ***Miller v. Alabama***, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), which held the imposition of a mandatory LWOP sentence on a juvenile convicted of murder violated the Eighth Amendment's prohibition against cruel and unusual punishment. *See* Laws of 2014, ch. 130, §9 (effective 6/1/2014).

After considering the written materials submitted and hearing the argument of counsel as to the setting of the minimum term, the court set a minimum term of life on each count of aggravated murder. 3RP 51-56; CP 84-88. The court had information that defendant had 34 major infractions in prison since 2001 including assaults on correction officers and participation in several violent fights. 3RP 46-47.

Defendant sought review of the court's setting of his minimum term. While his case was pending, the Court stayed resolution of his case pending its decision in ***State v. Bassett***, No 47251-1-II. That decision issued April 25, 2017. The Court then lifted the stay and sought supplemental briefing on its effect on the present case.

The ***Bassett*** court found the legislative that the ***Miller*** fix statute violates; Art. 1, §14 of the Washington Constitution prohibition against cruel punishment. It further held that no life sentence may ever be imposed on a juvenile offender without violating Art. 1, §14.

C. ARGUMENT.

1. ***BASSETT'S*** HOLDING DOES NOT COMPORT WITH CONTROLLING WASHINGTON LAW AND SHOULD NOT BE FOLLOWED.

The Washington Supreme Court in ***State v. Gunwall***, 106 Wn.2d 54, 720 P.2d 808 (1986), held that the following nonexclusive neutral factors are relevant in determining whether, in a given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern." ***Gunwall***, 106 Wn.2d at 58.

The Supreme Court indicated that the reason for this criteria is to ensure "that our decision will be made for well founded legal reasons and not by merely substituting our notion of justice for that of duly elected legislative bodies or the United States Supreme Court." ***Gunwall***, 106

Wn.2d at 62–63. A party who seeks to establish that the state constitution provides greater protection than the United States Constitution must engage in the six-factor analysis set forth in ***Gunwall***. ***State v. Ladson***, 138 Wn.2d 343, 979 P.2d 833 (1999).

Once the Washington Supreme Court has conducted a ***Gunwall*** analysis and has determined that a provision of the state constitution independently applies to a *specific* legal issue, it is unnecessary in subsequent cases involving the same legal issue to repeat the ***Gunwall*** analysis. ***State v. White***, 135 Wn.2d 761, 769, 958 P.2d 982 (1998); ***State v. Hendrickson***, 129 Wn.2d 61, 69–70 n. 1, 917 P.2d 563 (1996); ***State v. Ladson***, 138 Wn.2d 343, 348, 979 P.2d 833 (1999). The Court has also made it clear, however, that just because the state constitutional provision has been found to offer broader protections in one context does not necessarily mean that it will be found to be broader in all contexts. ***State v. Martin***, 171 Wn.2d 521, 528, 252 P.3d 872 (2011); ***State v. Dodd***, 120 Wn.2d 1, 838 P.2d 86 (1992). Once the Supreme Court has examined the six ***Gunwall*** criteria regarding a particular constitutional provision, generally the first, second, third and fifth factors will not vary from case to case and only the fourth and sixth factor need be examined. *See e.g.*, ***State v. Boland***, 115 Wn.2d 571, 575–76, 800 P.2d 1112 (1990); ***State v. Bustamante-Davila***, 138 Wn.2d 964, 979, 983 P.2d 590 (1999).

The Supreme Court has done a ***Gunwall*** analysis comparing the Eighth Amendment's protection against "cruel and unusual" punishment with Washington's protection against "cruel" punishment in Article 1, § 14. ***State v. Dodd***, 120 Wn.2d 1, 838 P.2d 86 (1992). Dodd wanted to waive general appellate review of his death sentence and the Supreme Court addressed whether such waiver was precluded by Article 1, § 14, even though it was permissible under the federal constitution. Looking at the textual language of the state provision and the difference in text between it and the federal provision, the court concluded:

> The drafters of the constitution did not adopt the ordinary phrase "cruel and unusual" because they thought the term "cruel" was "sufficient". The constitutional record does not indicate whether the framers believed the term "cruel" was synonymous with or more expansive than the term "cruel and unusual". Thus, it is not clear that the parallel provisions are significantly different.

Dodd, 120 Wn.2d at 21 (citations omitted). The Court looked to the *Journal of the Washington State Constitutional Convention*, 1889, at 501-02 (B. Rosenow ed. 1962), and noted that it did not establish that the drafters intended the state provision "to be interpreted more broadly than its federal counterpart." *Id.*

The Court in ***Dodd*** then looked at its prior decisions and found that on two prior occasions it had interpreted Art. 1, § 14 more broadly that the

Eighth Amendment, but neither dealing with waiver of appellate rights; those cases were ***State v. Fain***, 94 Wn.2d 387, 392-93, 617 P.2d 720 (1980) (sentencing a defendant to life imprisonment, even with the possibility of parole, for thefts that totaled less than $500 was unconstitutionally disproportionate) and ***State v. Bartholomew***, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984)(portion of RCW 10.95 that permitted admission of non-conviction data in penalty phase of capital case violated Eighth Amendment, but even if that interpretation of federal law was incorrect, the statutory provisions would violate state constitution). Both of these cases predated ***Gunwall***, so no analysis was done before concluding the state constitution has broader protections.

As for statutory law pertaining to review of a death sentence, the court in ***Dodd*** noted that the Legislature did not require automatic review of a death sentence prior to 1977, and then indicated that appellate review could be limited to that required by statute. The court found that preventing arbitrary or "cruel" capital punishment was not a local concern. Looking at its analysis of the ***Gunwall*** factors, the court held that the state constitution *did not* provide broader protections against the waiver of appellate review of a death sentence than the federal constitution.

> The ***Gunwall*** factors do not demand that we interpret Const. art. 1, § 14 more broadly than the Eighth Amendment. Const. art. 1, § 14 does not preclude the

> defendant in a capital case from limiting the scope of review to that required by state statute.

Dodd, 120 Wn.2d at 22.

Since the publication of ***Dodd***, the Supreme Court has several times examined whether a life without out parole sentence is disproportionate under the state constitution using the four factors set forth in ***Fain***[1]. ***State v. Rivers***, 129 Wn.2d 697, 715, 921 P.2d 495(1996)(sentenced to LWOP as a persistent offender for robbery in the second degree); ***State v. Manussier***, 129 Wn.2d 652, 677, 921 P.2d 473 (1996) (same) ***State v. Thorne***, 129 Wn.2d 736, 773-74, 921 P.2d 514 (1996)(sentenced LWOP as persistent offender for crimes of robbery in the first degree and kidnapping in the first degree); ***State v. Witherspoon***, 180 Wn.2d 875, 887, 329 P.3d 888 (2014) (sentenced to LWOP as a persistent offender for robbery in the second degree). In none of these cases did the court find the sentence violated Art. 1, § 14.

No Washington case has found that the state constitution is more protective of juveniles in sentencing matters than the federal constitution.

Looking at the principles set forth in the controlling decisions above, before an appellate court may find that a state constitutional

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[1] Those factors are: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. ***Fain***, 94 Wn.2d at 397, 617 P.2d 720.

provision provides greater protection that its federal counterpart, it must: 1) perform a ***Gunwall*** analysis or identify a prior decision of the Supreme Court that held the state constitutional provision more protective *in the same context*; 2) determine that the ***Gunwall*** analysis provides well founded legal reasons for finding broader protections so as to avoid the court substituting its notion of justice for that of duly elected legislative bodies or the United States Supreme Court; and 3) use the four ***Fain*** factors when assessing whether a sentence is disproportionately cruel under the state constitution.

Just recently, the Washington Supreme Court reviewed an 85-year sentence imposed at a resentencing hearing of a person who committed four homicides when he was 14 years old in order to determine whether the sentence violated either the Eight Amendment of the federal constitution or Art. 1, § 14 of the Washington Constitution. ***State v. Ramos***, 187 Wn.2d 420, 387 P.3d 650 (2017). The Court found that ***Miller v. Alabama***, 567 U.S. 460, 132 S. Ct. 2455, 2464, 183 L.Ed.2d 407 (2012), applied to "de facto" life sentences, not just literal life without parole sentences, and found that the procedures used at Ramos's resentencing hearing were constitutionally sufficient under ***Miller***. ***Ramos***, 187 Wn.2d at 437-53. The Court found the 85 year aggregated sentence did not violate the Eighth Amendment. *Id.* at 453. The Court was

also asked to review the sentence under the state constitutional prohibition against cruel punishment, but it declined to do so noting that Ramos had not properly briefed the issue - doing no more than citing to cases that have held the state constitution "often provides greater protection than the Eighth Amendment." *Id.* at 453-54. The Court discussed the inadequacies of the briefing:

> Even where it is already established that the Washington Constitution may provide enhanced protections on a general topic, parties are still required to explain why enhanced protections are appropriate in specific applications. Ramos does not provide any such explanation and does not address the [Fain] factors for determining whether a sentence independently violates the Washington Constitution.

Ramos, 187 Wn.2d at 667-68 (citations omitted).

Despite this clear statement by the Supreme Court as to what must be done to properly get a claim based on the state constitution before an appellate court, Division II ignored it when deciding ***State v. Bassett***, ___ Wn. App. ___, ___ P.3d ___ (2017). In ***Bassett***, this court stated there were greater protections under the state constitutional cruel punishment provision, Art. 1, § 14, than what the federal constitution provided under the Eighth Amendment's "cruel and unusual" provision without doing a ***Gunwall*** analysis. The amount of analysis in the ***Bassett*** opinion to show the state constitution provides broader protections is comparable to the

analysis in the inadequate briefing in the ***Ramos*** case that Supreme Court rejected. *Compare*, ***Basset***, at p. 8 with ***Ramos***, 187 Wn.2d at 667-68.

Completely missing in ***Bassett*** is any sort of examination of the silence within the Washington Constitution as to juveniles, much less any mention of providing additional protection to juveniles in sentencing. Nor is there any historical analysis. A separate juvenile justice system did not exist at the time of our statehood. *See*, ***State v. Schaaf***, 109 Wn.2d 1, 14, 743 P.2d 240 (1987). Unquestionably, a seventeen year old charged with a crime in 1889 would have been prosecuted in the same system as adults. As there is no constitutional right to be tried in a juvenile court under the Washington constitution, there can no constitutional right to be sentenced as a juvenile. *See*, ***In re Boot***, 130 Wn.2d 553, 925 P.2d 964 (1996). Indeed, it was the Legislature that created a separate juvenile court system, but it did not do so "until 1905, and did not pass comprehensive legislation concerning the juvenile justice system until 1913." *See*, ***State v. Schaaf***, 109 Wn.2d at 14; *see also*, Becker, *Washington State's New Juvenile Code: An Introduction*, 14 Gonz.L.Rev. 289, 290 (1979). The long history in Washington of treating juveniles differently, of trying not to label them as criminals and of focusing on their rehabilitation, comes from *legislative* enactment, not *constitutional* protections. *See*, ***Schaaf***, 109 Wn.2d at 15. There is nothing in Washington's history to suggest that the drafters of our

constitution wanted to provide *any* protection to juveniles charged with crimes so it is unreasonable to find that they intended to provide *greater* protection than that given under the federal constitution.

The above argument is not a complete ***Gunwall*** analysis. It is not the State's obligation to prove that the state constitution is coextensive with the federal constitution, but the proponent's obligation to show that it should be interpreted as providing broader protection. There is not any discussion of ***Gunwall*** in Mr. Ngoeung's briefing to meet this burden.

Further, the Washington Supreme Court has directed that when raising a claim that a sentence is disproportionally cruel under the state constitution, it is to be analyzed by examining the ***Fain*** factors.[2] The court in ***Bassett*** did not recognize ***Fain*** as controlling law; it chose not to apply it because it did not find the ***Fain*** factors to be adequate. ***Bassett***, at p. 23, 23. Just three months prior to ***Bassett***, in ***Ramos,*** the Supreme Court directed that a juvenile challenging a de facto life sentence under the state constitution needed to provide briefing of the ***Fain*** factors. 187 Wn.2d at 667-68. The Court of Appeals is not free to disregard the Supreme Court precedent when it finds it inadequate.

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[2] *See* n.1, *supra.*

a. The ***Bassett*** court merely substituted its notion of justice for that of duly elected Washington Legislature and the United States Supreme Court contrary to ***Gunwall***.

In ***Miller v. Alabama***, 567 U.S. 460, 132 S. Ct. 2455, 2464, 183 L. Ed. 2d 407 (2012), the United States Supreme Court held that "mandatory life without parole ["LWOP"] for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 132 S. Ct. at 2460. The Supreme Court did not categorically prohibit LWOP sentences but rather required that before imposing such sentences, "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." 132 S. Ct. at 2475.

The Supreme Court clarified in ***Montgomery v. Louisiana***, 577 U.S. ——, 136 S. Ct. 718, 735, 193 L. Ed. 2d 599 (2016), that ***Miller*** recognizes a substantive rule of constitutional law pursuant to the Eighth Amendment that "life without parole is an excessive sentence for children whose crimes reflect transient immaturity." ***Montgomery***, 136 S. Ct. at 735. The United States Supreme Court did not dictate detailed procedural requirements but left state legislatures "with considerable flexibility to develop their own procedures for implementing its substantive holding."

Ramos, 187 Wn.2d at 440; *see also* ***Montgomery***, 136 S. Ct. at 735 (When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems).

After the Washington Legislature enacted RCW 10.95.035 and amended RCW 10.95.030(3)(a)(ii) and (b) to comport with ***Miller***, a court imposing a sentence -or setting a minimum term- on a person who committed an aggravated murder before the age of 18 is not mandated to impose LWOP, although such a sentence or minimum term is not forbidden. The sentencing court is directed to consider "mitigating factors that account for the diminished culpability of youth as provided in ***Miller***... including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated." RCW 10.95.030(3)(b). The Legislature could have forbade a sentence or a setting of a minimum term of LWOP but opted not to do so. This statute does not violate ***Miller*** or the Eighth Amendment.

The court in ***Bassett*** seems to disagree with the Supreme Court's decision not to issue a categorical bar of a juvenile life sentence and the Washington Legislature's decision not to statutorily bar the imposition of

such a sentence. For example, it finds that even though the majority of United States jurisdictions still permit life without parole sentences for juveniles, that fact that 11 states banned such sentences through legislative enactments since ***Miller*** was published provides "objective indicia of society's standards" that there is a national consensus against juvenile life without parole sentences. ***Bassett***, at p. 24-27. Whether or not to categorically ban a life sentence for juveniles is exactly the sort of policy decision the legislature is entrusted to make and Washington's Legislature is with the majority of states that still permit the sentence as long as the procedures used to impose such a sentence comport with ***Miller***. The ***Bassett*** court is showing no deference to the Washington Legislature. The court's evidence and argument does not suggest a "national consensus" but that it is substituting its notion for justice for that of the Legislature and the United State Supreme Court.

The categorical bar analysis adopted by the ***Bassett*** court has no precedent in Washington; it is premised on an Iowa decision, ***State v. Sweet,*** 879 N. W. 2d 811 (Iowa 2016). It is clear that Iowa does not require a ***Gunwall*** type analysis when assessing whether its state constitution provides greater protections.

> In interpreting provisions of the Iowa Constitution, we may find federal authority persuasive, but it is certainly not binding. In the development of our own state constitutional

> analysis, we may look to decisions of the United States Supreme Court, dissenting opinions of the Supreme Court, cases from other states, and other persuasive authorities.

State v. Sweet, 879 N.W.2d at 832. In contrast to ***Gunwall***, Iowa courts are not required to examine Iowa's own constitutional history, prior laws or jurisprudence. As the framework for interpreting the state constitution in Iowa bears no resemblance to that required in Washington, ***Sweet*** cannot be relied upon to provide much guidance as to how to interpret the Washington constitution. It is certainly not controlling.

The section in ***Bassett*** discussing the "independent step' of the categorical bar analysis is premised on its conclusion that Washington's protection against cruel punishment is broader than the Eighth Amendment's protection. As noted earlier, the ***Bassett*** court never did the required ***Gunwall*** analysis before finding broader protection under the state constitution. Consequently, its decision is not based upon "well founded legal reasons" that the ***Gunwall*** analysis provides and which the Washington Supreme Court requires.

It should be noted that when the Washington Supreme Court upheld the imposition of a life sentence in ***Ramos,*** it concluded by stating:

> In light of the constantly evolving nature of juvenile justice law, we must take a measured approach to each issue as it arises, giving sufficient deference to legislative judgments and ensuring that we confine our decisions to the merits of the issues presented.

State v. Ramos, 187 Wn.2d at 458, as amended (Feb. 22, 2017), *reconsideration denied* (Feb. 23, 2017). In ***Bassett***, Division II failed to take a measured approach or give any deference to legislative judgments. Instead, it issued an opinion that has little support in state law and which holds a legislative enactment unconstitutional. The decision in Bassett would also seemingly invalidate the same sentence that the Supreme Court just upheld in ***Ramos***.

Division II should reassess its decision in ***Bassett***. It did not follow Washington Supreme Court jurisprudence in reaching the conclusion that Art. 1, §14 provides greater protections to juveniles facing sentencing or the setting of a minimum term. Throughout our state's history, it has been the Washington Legislature protecting juveniles from harsh criminal sentences by enacting a separate juvenile justice system. That it chose, after ***Miller,*** not to categorically ban life sentences for juveniles convicted in adult court for aggravated murders does not conflict with either the state or federal constitutions. The court should not apply ***Bassett*** to this case, but uphold the setting of the minimum term for the reasons stated in the response brief.

D. CONCLUSION.

This court should retreat from the decision in ***Bassett***, because it does not comport with controlling Washington law and is not well reasoned. For the reasons set forth in the State's response brief, the Court should affirm the setting of the minimum terms.

DATED: May 26, 2017.

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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.26.17
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PIERCE COUNTY PROSECUTING ATTORNEY

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